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OFFICE OF PETITIONS

In re Patent of Fournery et al. : DECISION ON REQUEST
Patent No. 7,618,940 : FOR
Issue Date: November 17, 2009 : RECONSIDERATION OF
Application No. 10/729,167 : PATENT TERM ADJUSTMENT
Filed: December 4, 2003 : and
Atty Docket No. FP0602.2 US : NOTICE OF INTENT TO ISSUE
: CERTIFICATE OF CORRECTION

This is a decision on the petition filed on January 19, 2010 (certificate of mailing date January 13, 2010), which is being treated as a petition under 37 CFR 1.705(d) requesting that the patent term adjustment indicated on the above-identified patent be corrected to indicate that the term of the above-identified patent is extended or adjusted by one thousand sixty-five (1065) days.

The petition to correct the patent term adjustment indicated on the above-identified patent to indicate that the term of the above-identified patent is extended or adjusted by one thousand sixty-five (1065) is **GRANTED to the extent indicated herein.**

Patentees assert the total period of adjustment is 1065 days, which is the sum of 540 days of delay under 35 U.S.C. § 154(b)(1)(A) ("A Delay") and 934 days of delay under 35 U.S.C. § 154(b)(1)(B) ("B Delay"), reduced by 45 days overlap, and reduced by 364 days of applicant delay.

The Office does not dispute patentees' assertions that the period of A delay is 540 days, the period of overlap between the period of A delay and the period of B delay is 45 days, and the period of applicant delay is 364 days.

The Office disagrees with patentees' assertion that the period of B delay is 934 days. The period of B delay in this case is 720 days. Unless a Request for Continued Examination ("RCE") is filed, the period of B Delay ends on the date the patent issues. In this case, a RCE was filed June 25, 2009. Per 35 U.S.C. § 154(b)(1)(B)(i), B Delay does not include "any time consumed by continued examination of the application requested by the applicant under section 132(b)." The maximum possible period of B Delay in this case is 933 days, which is the number of days beginning on December 5, 2006, the day after the

date three years after the application's filing date, and ending on June 24, 2009, the day before the date the RCE was filed.

In addition, patentees' determination fails to exclude the number of days consumed by appellate review. As stated in 35 U.S.C. 154(b)(1)(B)(ii), B delay does not include "any time consumed by appellate review by the Board of Patent Appeals and Interferences." The period of B delay does not include the 213 day period beginning on November 24, 2008, the date the Notice of Appeal was filed, and ending on June 24, 2009, the day before applicants withdrew the appeal by filing a RCE. Excluding the 213 days consumed by appellate review results in a period of B delay of 720 days (933 - 213).


The correct patent term adjustment is 851 days, which is the sum of 540 days of A Delay and 720 days of B Delay, reduced by 45 days of overlap, and reduced by 364 days of applicant delay.

The Office will *sua sponte* issue a certificate of correction. Pursuant to 37 CFR 1.322, the Office will not issue a certificate of correction without first providing assignee or patentee an opportunity to be heard. Accordingly, patentees are given **one (1) month or thirty (30) days**, whichever is longer, from the mail date of this decision to respond. No extensions of time will be granted under 37 CFR § 1.136.

The Office will charge the \$200.00 fee set forth in 37 CFR 1.18(e) to deposit account no. 50-0811. No additional fees are required.

The application is being forwarded to the Certificates of Correction Branch for issuance of a certificate of correction. The Office will issue a certificate of correction indicating that the term of the above-identified patent is extended or adjusted by **eight hundred fifty-one (851) days**.

Telephone inquiries should be directed to the undersigned at (571) 272-3230.


Shirene Willis Brantley
Senior Petitions Attorney
Office of Petitions

Enclosure: Copy of DRAFT Certificate of Correction

UNITED STATES PATENT AND TRADEMARK OFFICE
CERTIFICATE OF CORRECTION

PATENT : 7,618,940 B2

DATED : November 17, 2009

DRAFT

INVENTOR(S) : Fournay et al.

It is certified that error appears in the above-identified patent and that said Letters Patent is hereby corrected as shown below:

On the cover page,

[*] Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 570 days

Delete the phrase "by 570 days" and insert – by 851 days--